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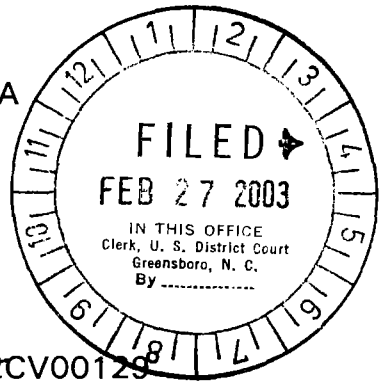
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



TALTON Y. GALLIMORE)
)
Plaintiff,)
)
v.) Case No. 1:01CV00129
)
GERALD HEGE, SHERIFF OF DAVIDSON)
COUNTY, NORTH CAROLINA, (In his)
Individual Capacity) and OLD REPUBLIC)
SURETY COMPANY)
)
Defendant.)

MEMORANDUM ORDER

TILLEY, Chief Judge

This matter is before the Court on the Defendant's Motion for Summary Judgment [Doc. # 38]. For the reasons set forth below the Defendant's Motion is GRANTED.

I.

The facts in the light most favorable to the plaintiff are as follows: the Davidson County Sheriff's Department ("Sheriff's Department") began a criminal investigation after a truckload of furniture was stolen from a local church. The Sheriff's Department, through local informants, developed leads that Mr. Gallimore had stolen the furniture. The Sheriff's Department also conducted surveillance of Mr. Gallimore's property. The investigation suggested that Mr. Gallimore was transporting stolen furniture from Davidson County to Long Island, New York

where he would sell the stolen furniture. In addition, officers in the Sheriff's Department learned from the Internal Revenue Service that Mr. Gallimore had not filed a tax return since the 1960's.

As a result of the investigation, the Sheriff's Department obtained an arrest warrant for Mr. Gallimore for operating a continuing criminal enterprise and a search warrant for Mr. Gallimore's property at 3139 Denton Road. The New York State Police also obtained an arrest warrant for Mr. Gallimore for felony possession of stolen goods and search warrants for his stores in New York. On February 5, 1999, the New York state police arrested Mr. Gallimore when he arrived at his Rocky Point store with a load of stolen furniture.

About the same time, the Sheriff's Department executed the search warrant on the Davidson County property at 3139 Denton Road and seized a substantial amount of property from 3139 Denton Road. The Sheriff's Department also seized property from 3137 Denton Road. The driveway from 3139 Denton Road extended several feet to 3137 Denton to become the parking area for a warehouse located on the 3137 Denton Road property. Mr. Gallimore operated his business from the warehouse at 3137 Denton Road and lived in the house at 3139 Denton Road. The property seized from 3137 Denton Road -- a pick-up truck, a dump truck, a road tractor, and four trailers -- was taken from the graveled parking lot.

On the same day, officers from the Sheriff's Department seized additional vehicles they believed had a connection to Mr. Gallimore's theft of furniture. A

Ford backhoe, a John Deere Trackloader, a Caterpillar Trackloader, a semi trailer, a GMC road tractor and a dump truck were seized from an unimproved lot belonging to Mr. Gallimore on Old Highway 109 in Silver Valley, North Carolina. There was no fencing around the lot and the vehicles were visible from the highway. Sheriff Hege was not present at the Silver Valley property when the vehicles were searched or seized.

Mr. Gallimore is seeking relief under 42 U.S.C. § 1983 to recover personal property and damages allegedly suffered as a result of the seizure made by Sheriff Hege and the officers of the Davidson County Sheriff's Department. Mr. Gallimore makes four claims: (1) the search and seizure at the Silver Valley property violated the Fourth Amendment; (2) the seizure of the trucks and trailers at 3137 Denton Road was a violation of the Fourth Amendment; (3) the seized property was negligently stored; and (4) $34,000.00 was converted by the Defendant. Mr. Gallimore has abandoned the $34,000.00 conversion claim in his reply to summary judgment. As a result summary judgment shall be granted to Sheriff Hege on that count. Mr. Gallimore is still pursuing his remaining three claims.

For the reasons which follow, it is determined that Sheriff Hege was not a participant nor even present during the Silver Valley seizure and, since there is no evidence otherwise to support supervisory liability claim one will be dismissed. It is determined that the seizure at 3137 Denton Road was not in violation of the Fourth Amendment and claim two will be dismissed. And, it is further determined

determined that the third claim which is brought under state law should be dismissed because the law of North Carolina does not permit recovery for mere negligence of a state official performing official duties unless his actions were corrupt or malicious or he acted outside and beyond the scope of his duties.

II.

Summary judgment is proper only when, viewing the facts in the light most favorable to the non-moving party, there is no genuine issue of any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Cox v. County of Prince William, 249 F.3d 295, 299 (4th Cir. 2001). Summary judgment requires a determination of the sufficiency of the evidence, not a weighing of the evidence. Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986). An issue is genuine if a reasonable jury, based on the evidence, could find in favor of the nonmoving party. Anderson, 477 U.S. at 248; Cox, 249 F.3d at 299. The materiality of a fact depends on whether the existence of the fact could cause a jury to reach different outcomes. Anderson, 477 U.S. at 248; Cox, 249 F.3d at 299; Solers, Inc. v. Hartford Cas. Ins. Co., 146 F.Supp.2d 785, 791 (E.D.Va. 2001). The party opposing the motion may not rest upon its pleadings but must instead provide evidence or point to evidence already in the record that would be sufficient to support a jury verdict in its favor. Anderson, 477 U.S. at 248. This evidence must be properly authenticated pursuant to Rule 56(e). Orsi v. Kirkwood, 999

F.2d 86, 92 (4th Cir. 1993).

III.

A.

As stated earlier, Sheriff Hege was not present at the Silver Valley property and there is no evidence that he actually participated in the seizures there. To establish §1983 liability, a plaintiff must affirmatively show that the "official charged acted personally in the deprivation of the plaintiff's rights." Wright v. Collins, 766 F.2d 841, 850 (4th Cir. 1985) (citations and quotations omitted); Garraghty v. Virginia, 52 F.3d 1274, 1280 (4th Cir. 1995). Moreover, a plaintiff may not avail himself of the doctrine of respondeat superior, as this doctrine is inapplicable to §1983 claims. Wright, 766 F.2d at 850. Thus, each named defendant must have had personal knowledge of and involvement in the alleged violations of a plaintiff's constitutional rights for the action to proceed against them or, in the case of a supervisor who was not present or a personal participant, be indifferent to or tacitly approve a subordinate's constitutionally injurious conduct which could have been anticipated on the basis of past behavior. Slaken v. Porter, 737 F.2d 368, 372 (4th Cir. 1984); Wellington v. Daniels, 717 F.2d 932, 935-36 (4th Cir 1983).

A plaintiff cannot satisfy the burden of proving supervisory liability "by pointing to a single incident or isolated incidents ..." Id. Instead, supervisory liability may only be imposed where "there is a history of widespread abuse."

Wellington, 717 F.2d at 936. Therefore, a plaintiff who is able to prove deliberate indifference, tacit authorization, or widespread and pervasive abuses may be able to establish supervisory liability under 42 U.S.C. §1983. Slakan v. Porter, 737 F.2d 368, 372 (4th Cir.1984), cert. denied, 470 U.S. 1035 (1985).

There are three elements necessary to establish supervisory liability under § 1983: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices"; and (3) that there was an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff. Miltier v. Beorn, 896 F.2d 848, 854 (4th Cir.1990). With regard to the first element, the establishment of a "pervasive" and "unreasonable" risk of harm requires evidence that the conduct is widespread, or at least has been conducted on several different occasions and that the conduct engaged in by the subordinate poses an unreasonable risk of harm of constitutional injury. Shaw v.Stroud, 13 F.3d 791, 799-800 (4th Cir. 1994).

Assuming for this discussion that the seizures at Silver Valley were unconstitutional, either because the officers lacked probable cause or because they entered upon property in which Gallimore maintained a reasonable expectation of privacy, there has been no evidence proffered that Sheriff Hege was aware of

similar situations, that he was aware of and condoned searches and seizures lacking probable cause, or that there were other searches or seizures resulting from officers, without a warrant, searching for contraband or evidence in an area in which the victim maintained a legitimate expectation of privacy. As a result, Gallimore is unable to establish an element required to make out a claim of supervisory liability and the claim relating to seizures on the Silver Valley property will be dismissed.

B.

Mr. Gallimore's second claim arises from the seizure of a pick-up truck, a dump truck, a road tractor, and four trailers from 3137 Denton Road. Mr. Gallimore claims that the seizure violated his Fourth Amendment rights because the search warrant recites "3139 Denton Road" and the property listed was located at 3137 Denton Road.

Gallimore argues that a warrant specifically for 3139 Denton Road was necessary to seize his vehicles. However, Gallimore's vehicles at 3139 Denton Road were not seized in violation of the Fourth Amendment. In G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977), the Supreme Court approved an analogous warrantless seizure of automobiles, explaining, "the seizures of the automobiles in this case took place on public streets, parking lots, or other open places, and did not involve any invasion of privacy." The seizure was not an invasion of privacy because the automobiles were in public area where there is a limited exception of

privacy. Id. at 351; See White, 526 U.S. at 566 (holding that seizure of a defendant's car from the parking of his place of employment was not a seizure under the Fourth Amendment). Further, what an individual knowingly exposes to the public, even in his home or office, is not subject to Fourth Amendment protection. Katz, 389 U.S. at 351.

The vehicles seized in this case were located in the gravel parking area adjacent to a warehouse at 3137 Denton Road. Gallimore had a limited expectation of privacy in the area because he opened the area to the public by running his business from the warehouse and parking lot. In addition, the vehicles were in plain view from the street. Therefore, a warrant was not necessary to seize the vehicles and Gallimore did not suffer a constitutional injury.

In addition, Mr. Gallimore did not live in the warehouse or in any home located on 3137 Denton Road. As a result, Mr. Gallimore did not suffer an invasion of privacy and would not have standing to claim that the curtilage of 3137 Denton was invaded without a warrant. See Schneider v. County of San Diego, 28 F.3d 89, 92 (9th Cir. 1994). In Schneider, several vehicles belonging to the defendant were seized from the parking lot of a home that he rented out. Id. The defendant, because he did not live in the home, but instead rented it out, did not have an expectation of privacy in the area surrounding the house. Id. In this case, Mr. Gallimore does not have a privacy interest in the outside parking area around the warehouse.

In light of finding that Gallimore has failed to establish a violation of a constitutional right, it is unnecessary to examine the remaining elements under supervisory liability or seek to establish whether or not Sheriff Hege was entitled to qualified immunity.

IV.

Mr. Gallimore's third claim for relief is negligent and careless storage. Section 1983 does not provide a claim for negligence, therefore this claim is governed by state law. Daniels v. Williams, 474 U.S. 327, 328 (1986).

Mr. Gallimore is suing Sheriff Hege only in his individual capacity. A public official is immune from personal liability for mere negligence in the performance of his duties, but he is not shielded if his actions were corrupt or malicious or if he acted outside and beyond the scope of his duties. Slade v. Vernon, 110 N.C. App. 422, 428, 429 S.E.2d 744, 747 (1993). In Slade, the plaintiff alleged that a deputy and several other jail personnel were negligent in their failure to supervise a prisoner whom they knew or should have known was likely to injure himself. Id. The North Carolina Court of Appeals granted summary judgment in favor of the deputy and other personnel because they could not be held personally liable for negligence. Id.

In this case, Mr. Gallimore alleges that while various items of property remained in the custody of the Sheriff's Department, they were carelessly and negligently stored in an open field exposed to the elements and available to

vandals. In particular, all the windows in the Mr. Gallimore's Chevrolet Silverado truck were broken out. As a result, water accumulated in the floor of the truck and the fair market value of the truck was decreased. The Silverado truck was stored in an impound lot enclosed by a chain link fence topped with barbed wire. Gallimore does not claim or present any evidence that the actions were corrupt or malicious. Therefore, because Gallimore claims that Sheriff Hege was merely negligent in storing the property, summary judgment in favor of Sheriff Hege is appropriate.

V.

For the reasons stated above, Defendant's motion for summary judgment is GRANTED.

This, the 21 day of February, 2003.

United States District Judge